

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PATRICK HENRY MURPHY, JR.,	.	4:19-CV-01106
PLAINTIFF,	.	HOUSTON, TEXAS
VS.	.	APRIL 18, 2019
	.	2:00 P.M.
TDCJ EXECUTIVE DIRECTOR	.	
BRYAN COLLIER, ET AL,	.	
DEFENDANTS.	.	

TRANSCRIPT OF INITIAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE SIM LAKE
UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PLAINTIFF:

Jeffrey R. Newberry
UNIVERSITY OF HOUSTON LAW CENTER
4604 Calhoun Road
Houston, Texas 77204-6060

FOR THE DEFENDANTS:

Leah Jean O'Leary
Amy H. Prasad
Matthew D. Ottoway
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
Post Office Box 12548
Austin, Texas 78711

1 ***APPEARANCES - CONTINUED***
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4 OFFICIAL COURT REPORTER:

5 Mayra Malone, CSR, RMR, CRR
6 U.S. Courthouse
515 Rusk
7 Room 8004
Houston, Texas 77002
713-250-57878
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10 Proceedings recorded by mechanical stenography. Transcript
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PROCEEDINGS

2 THE COURT: We are here this afternoon for the
3 scheduling conference in Civil Action H-19-1106, Patrick Henry
4 Murphy, Jr., versus the Texas Department of Criminal Justice
5 and Bryan Collier.

6 Beginning with plaintiff's counsel, will counsel
7 please identify themselves for the Court?

8 MR. NEWBERRY: I'm Jeff Newberry for Patrick Henry
9 Murphy.

10 MS. O'LEARY: Your Honor, I'm Leah O'Leary for the
11 defendant, and I also have Amy Prasad and Matt Ottoway. We are
12 from the Attorney General's office.

13 THE COURT: Thank you. I assume everybody has read
14 the first amended complaint. I have a question about a
15 statement that appears in page 13. So turn to that page,
16 please.

25 First of all, let me ask plaintiff's counsel,

14 : 0 1 1 where is the reference on page 8 to that? Is it paragraph 5C?
2 Is that correct?

3 MR. NEWBERRY: Yes, Judge Lake. 5C is correct.

4 THE COURT: And there is language on paragraph 3-12,
14 : 0 2 5 the previous page, "The offender may have visits with a TDCJ
6 chaplain or a minister/spiritual advisor who has the
7 appropriate credentials and his attorneys on the day of
8 execution."

9 Let me ask defense counsel, is this a correct
14 : 0 2 10 statement on page 13? In other words, can an inmate -- can a
11 TDCJ chaplain visit with the inmate after 4:00 p.m.? I guess
12 that's the precise question.

13 MS. O'LEARY: Your Honor, our understanding is that
14 the chaplain visits, including with TDCJ chaplains, happen
15 between 3:00 and 4:00. From 4:00 until the time of the
16 execution, other procedures are happening, such as the policy
17 talks about. There are showers. There is a meal, things like
18 that. And so certainly I'm not prepared to point you to
19 evidence yet, but that's our understanding. And that is
20 certainly something --

21 THE COURT: Where do you get the idea that there is no
22 restriction by TDCJ chaplains after 4:00 p.m.?

23 MR. NEWBERRY: Judge Lake, I believe if there was that
24 restriction, it would be expressed in paragraph 5C. Let me
25 point out, "a minister/spiritual advisor and attorney visits."

14 : 0 3 1 And I don't think that they would combine TDCJ chaplain and
2 minister/spiritual advisor to the same category when they were
3 careful on the previous page, 3-12, to list those as three
4 separate categories. But it is just the absence of the TDCJ
5 language in 5C that they were basing that on.

14 : 0 3 6 MS. O'LEARY: Your Honor, I will also point you to the
7 exception in that same provision that says the warden can grant
8 exceptions to the 4:00 restriction. And we are not aware of
9 any requests by Mr. Murphy for an exception, which is permitted
10 under that policy.

14 : 0 4 11 THE COURT: The second question is: It talks about
12 TDCJ chaplains and a minister/spiritual advisor has the
13 appropriate credentials. That implies that spiritual advisors,
14 such as the one requested by Mr. Murphy, could be approved for
15 visits at the same time as the TDCJ chaplain, if they had the
16 appropriate credentials. So is that correct?

17 17 MS. O'LEARY: That is correct, Your Honor. And
18 credentials just refers to they have gone through the steps to
19 be approved to enter onto the unit and things like that.

14 : 0 4 20 THE COURT: So what Mr. Murphy has identified as
21 spiritual advisor who he wanted to be present with him, could
22 that person apply and receive credentials to be with
23 Mr. Murphy?

24 24 MS. O'LEARY: Not inside the execution chamber.

14 : 0 4 25 THE COURT: I understand that. Under the current

14 : 04 1 policy, nobody can be in the execution chamber. I'm dealing
2 with the equal protection claim now. Could that person apply
3 for credentials?

14 : 05 4 MS. O'LEARY: Yes. And my understanding, based on the
5 pleadings, is that Mr. Murphy's spiritual advisor already has
6 the credentials to enter the unit and has been visiting with
7 Mr. Murphy on the prison facility.

14 : 05 8 THE COURT: Well, why wasn't he allowed in the
9 execution chamber on the date of Mr. Murphy's scheduled
10 execution constitution?

11 11 MS. O'LEARY: Well, of course, the execution was
12 stayed, so we didn't check that far. But the request was
13 denied because the current policy at that time said that only
14 TDCJ employees are allowed in the execution chamber. And
15 that's because the credentials just to visit an offender on a
16 prison facility are not as sensitive and probably not as deeply
17 investigated as someone who is actually standing in reaching
18 proximity to someone who is being executed in the same room.
19 So just because a spiritual advisor has been approved to enter
20 onto a TDCJ facility to meet with an offender, that is not the
21 same as a limitation that only TDCJ employees can be in the
22 execution chamber.

14 : 06 23 THE COURT: So with respect to the equal protection
24 argument, if Mr. Murphy's spirit advisor could be credentialed
25 to have the same access to Mr. Murphy that any other approved

14 : 0 6
1 chaplain would have, why do you still have an equal protection
2 claim?

3 MR. NEWBERRY: Because absent evidence pointing --
4 proving differently, I believe that the TDCJ chaplain does have
14 : 0 6 more access than a minister/spiritual advisor with approved
5 credentials.

6
7 And it is correct that Reverend Shih's
8 credentials have been approved. I believe he was allowed to
9 visit Mr. Murphy during this 3:00 to 4:00 window, but his visit
14 : 0 6 had to end there. And absent evidence to the contrary, I
10 believe even under the current policy, a TDCJ chaplain, which
11 would only be a Christian chaplain or a Muslim chaplain, could
12 have access beyond that.

13
14 THE COURT: Well, if what the state tells me the
15 policy provides, then I don't see that you have an equal
16 protection argument, but we will have to just see what the
17 discovery reflects on that.

18
19 The question about being in the chamber, the
20 execution chamber rises to a different level, because the
21 state -- even in Justice Kavanaugh's concurring opinion, he
22 said, "A state may choose a remedy which would allow religious
23 advisors only in the waiting room, and not the execution room,
24 because there are operational and security issues associated
with execution by lethal injection."

25
24 : 0 7 If you have constitutional and statutory claims

1 dealing with Mr. Murphy's desire to have his advisor in the
2 room to assist him in praying at the time of his execution,
3 that's an issue that will have to be addressed under the
4 merits. You have got two claims. You have got equal
5 protection, which you will have to prove satisfies my concerns
6 about that, and you have got this other claim.

When the state revised its policies, did you check to see what other states allowed with respect to the access by spiritual advisors into the execution chamber?

10 MS. O'LEARY: I know that there is a consideration of
11 what Alabama does in their state, but I'm not aware of a
12 further study of what other states do.

23 THE COURT: Well, Justice Kavanaugh appears to
24 foreshadow the Court's opinion that there might be a compelling
25 reason.

14 : 0 9
1 All right. I have some questions about the
2 proposed discovery plan that you submitted.

3 You refer in paragraph 2 to two cases. 18A985 is
4 the Supreme Court's denial of stay. Is that case still
5 pending?

6 MR. NEWBERRY: It is. They granted the stay. It was
7 pending the timely filed consideration and disposition of a
8 cert petition. Our petition for certiorari is currently due
9 June 25. We don't anticipate asking for any extension, but it
10 is --

11 THE COURT: What are you going to seek cert from?

12 MR. NEWBERRY: The Fifth Circuit opinion.

13 THE COURT: They granted the stay. Isn't that moot?

14 MR. NEWBERRY: No, Judge Lake, it's not. Because the
15 stay was pending the filing, consideration and disposition of a
16 cert petition.

17 THE COURT: It seems to me it will be moot, but we
18 will worry about that later.

19 What about 18-8615, where is that case pending?

14 : 10
20 MR. NEWBERRY: That is also the Supreme Court. It's a
21 petition for writ of prohibition that we filed at the same
22 time. That's scheduled to be conferred on the 26th, I
23 believe. That exact -- if I'm missing that date, it's in our
24 first amended complaint, but I believe it is April 26th at that
25 scheduling conference.

1 THE COURT: Okay. Do you intend to amend or add any
2 additional parties? You have got a very short proposed
3 schedule. If I have to bring in new parties or allow
4 amendments, that could delay further discovery.

5 MR. NEWBERRY: We do not anticipate adding -- we have
6 no plans to add additional parties, and the only reason we
7 needed to do this amendment today was to adjust to the new
8 policy. We have no plans --

9 THE COURT: Then under Court's schedule, there will be
10 none without prior approval of the Court.

11 Now, you indicate as to the schedule that you can
12 complete discovery by June 28th. That's 70 days from today.
13 And you anticipate sending out at least interrogatories.

14 I have a question to plaintiff's counsel about
15 page 5, subparagraph D: Depending on the answers he receives
16 from the interrogatories, the plaintiff anticipates he may send
17 interrogatories to Collier, Davis, Lewis, et cetera.

18 You mean take depositions or do you just mean
19 further interrogatories?

20 MR. NEWBERRY: Judge Lake, it depends on the answers
21 to interrogatories. I think it is very likely that our further
22 questions could be satisfied with further interrogatories.

23 THE COURT: Because you understand I'm talking
24 about -- 70 days doesn't allow much time.

25 || MR. NEWBERRY: Yes, Judge Lake.

1 THE COURT: All right. Does the state have a problem
2 with 70 days for discovery?

3 MS. O'LEARY: Your Honor, we are willing to put in the
4 resources to expedite this scheduling order. However, if I
5 may, I would like to raise one issue. I think that it would be
6 beneficial for us to resolve the issue of exhaustion before we
7 dive into all of this discovery.

8 THE COURT: No. We are not going to do that. We are
9 going to move forward.

10 MS. O'LEARY: Okay.

11 THE COURT: We are going to move forward. There will
12 be no 12(b) (6) motions. There will be a summary judgment
13 motion by each side, a Rule 56 motion. We are going to move
14 this case through as quickly as we can, given the interests
15 involved. We are not going to have a threshold exhaustion
16 argument.

17 Do you anticipate an expert witness? You say no.

18 || MR. NEWBERRY: That's correct. We don't anticipate --

19 THE COURT: There will be no experts.

20 The discovery cutoff will be June 28th.
21 Dispositive motions will be due July 19th. Each side is
22 limited to one dispositive motion, not to exceed 25 pages of
23 argument.

24 Now, I have some other questions. Are there any
25 objections other than what the state has already mentioned as

14 : 14 1 to the schedule?

2 MR. NEWBERRY: We have no objections.

3 MS. O'LEARY: No, Your Honor.

4 THE COURT: All right. I have a question for the
14 : 14 state. We have already talked about the equal protection
5 issue. You have avoided the First Amendment and statutory
6 claims with a policy -- this is a suggested policy.

7 8 What about a policy that allows an inmate who is
9 scheduled for execution to advise the state no later than 30
10 days before his scheduled execution whether he wishes a
11 spiritual advisor to be with him in the execution chamber? And
12 if so, to identify either the preferred advisor or the religion
13 of the advisor whom he wishes?

14 14 : 15 The state probably has already approved Christian
15 and Muslim chaplains, and the state could also approve other
16 advisors from major religions, such as Buddhism, and could
17 approve advisors' requests 30 days before the execution, which
18 would moot this issue. And this would avoid any last-minute
19 requests. And if the plaintiff's request for a spiritual
20 advisor raised legitimate security concerns -- for example,
21 five years ago, if the plaintiff had requested Osama Bin Ladin
22 as his advisor, or some person who appeared beyond the pale of
23 a legitimate religious advisor, the state could probably deny
24 the request. But if the request appeared to be valid, you
25 could grant the request, allow the advisor to be in the chamber

1 and moot this case.

2 || What about that?

3 MS. O'LEARY: Respectfully, Your Honor, the state is
4 taking the position that allowing non-TDCJ employees in the
5 execution chamber would severely compromise the security of the
6 procedure, and we believe that we will meet our threshold
7 burden of proving a compelling interest to satisfy the
8 religious standard.

16 THE COURT: But right now, no religious advisor, even
17 a TDCJ chaplain, can be in the execution chamber?

18 MS. O'LEARY: That's right. Under the new policy, we
19 have removed chaplain from the list of people who are allowed
20 in the execution chamber.

21 THE COURT: Okay. All right. Those are my questions.

22 If anybody else has any concerns or observations,
23 I will be glad to hear them, beginning with plaintiff's
24 counsel.

25 MR. NEWBERRY: I have none. Judge Lake.

14 : 17 1 MS. O'LEARY: Your Honor, I think just with regard to
2 discovery, I anticipate that there is going to be a lot of
3 contested issues throughout discovery, because information
4 pertaining to executions is very sensitive and it is obviously
5 a political issue. As we saw in the recent Supreme Court case
6 in *Levin*, it can implicate physical threats and things like
7 that. And so the information related to executions is -- it's
8 guarded.

14 : 18 9 THE COURT: Let me ask plaintiff's counsel. You want
10 a list of everyone who has been in the execution chamber since
11 December 7, 1982. That's 36 years. That does seem somewhat
12 excessive. Can you justify that date?

13 MR. NEWBERRY: That's just the first time -- that's
14 the date of the first execution after moratorium. I don't
15 think -- it is our belief, Judge Lake, that that list is not
16 going to be extremely long. Normally the people that are there
17 in the execution chamber are the correctional institution
18 division head, which is currently Ms. Lorie Davis, the
19 Huntsville Unit Warden, and I believe the TDCJ chaplain, who
20 usually, I believe -- and, of course, it is not in their
21 current policy, but I believe usually it was the Huntsville
22 Unit Chaplain. So I don't think this list of people is going
23 to be particularly long, even though it does cover many
24 executions.

14 : 19 25 The reason that is important to us is that the

1 affidavit from Defendant Davis that was filed in their response
2 to our complaint said that the reason it can only be TDCJ
3 employees that are there in the execution chamber is she has to
4 have known them for many years. They have to have shown years
5 of devoted service, I believe is the phraseology there in the
6 affidavit. And so that information, along with how long they
7 worked at TDCJ or for TDCJ at that time, is relevant, because
8 we need to see how long these people were employed there;
9 whether or not it is true that only people that have shown
10 years of devoted service are in the execution chamber.

11 MS. O'LEARY: Sorry. Some of the identities of people
12 involved in executions will be statutorily confidential.

13 THE COURT: You can enter a protective order. That's
14 not a problem, given the quality of the lawyers. I don't doubt
15 that you can enter a protective order. There is a proposed
16 protective order on the Court's website which you can easily
17 either agree to or revise in a couple days.

18 I am concerned that you are not going to initiate
19 written discovery until 30 days. That seems like an
20 excessive -- why can't you do it in 15 days?

21 MS. O'LEARY: To begin discovery, Your Honor?

22 THE COURT: Yes. Just send out interrogatories.

23 MS. O'LEARY: Well, our entry deadline is not until
24 May 28, and we would like to take advantage of that elongated
25 time. That's the whole reason that we waived service, to give

14 : 20 1 us more time to answer and get ourselves ready for a lawsuit.
2 And so initiating discovery would essentially eliminate that
3 benefit that we have earned by waiving service.

14 : 20 4 THE COURT: I'm going to allow written discovery to be
5 commenced on May 17th.

6 6 And if you have a squabble over discovery, I
7 expect you to work together to resolve it and, if not, file
8 something quickly with the Court. And we will set up a
9 hearing, probably by telephone conference, as quickly as my
14 : 21 10 schedule permits.

11 MS. O'LEARY: Yes, Your Honor.

12 MR. NEWBERRY: Yes, Your Honor.

13 THE COURT: Anything else?

14 MR. NEWBERRY: Not from plaintiff.

14 : 21 15 MS. O'LEARY: Not from the state, Your Honor.

16 THE COURT: Thank you all. You are excused. Have a
17 good weekend.

18 *(Court adjourned at 2:21 p.m.)*

19 * * * *

20 I certify that the foregoing is a correct transcript from
21 the record of proceedings in the above-entitled cause.

22 Date: June 26, 2019

23

24 *1st Mayra Malone*

25

Mayra Malone, CSR, RMR, CRR
Official Court Reporter